

## Comment

# Bounty Hunting in Our Time: The Countervailability of Regional Development Programs

### I. INTRODUCTION

In the autumn of 1988, all of Canada was abuzz. Parliamentary elections were to take place on November 21—elections that would be governed by practically one issue alone: the U.S.-Canada Free Trade Agreement (FTA). Prime Minister Brian Mulroney had spent two years negotiating the agreement, both sides had signed it, and there remained only ratification by the Canadian Parliament. Under the agreement, Parliament was required to ratify it by January 1, 1989.

The question of whether free trade with the United States was good for Canada—a question that had as much to do with nationalism as with economic well-being—electrified the voters. The *Toronto Star* bitterly campaigned against free trade via news columns and editorial pages, warning of the threat to Canada's economic independence. On television, two FTA-dominated debates prompted angry exchanges between Mulroney and opponents, New Democratic leader Ed Broadbent and Liberal Party leader John Turner. Broadbent trumpeted: "I don't want to see the same social services here as in the U.S."<sup>1</sup> Retorted Mulroney: "You are trying to frighten the elderly."<sup>2</sup> Turner responded less hysterically, proclaiming that "[t]he salesman . . . has a very weak product."<sup>3</sup> Both Broadbent and Turner vowed to tear up the deal if elected.<sup>4</sup>

Opposition stemmed from the understanding that the FTA would do nothing to squelch the United States' frustratingly tireless imposition of countervailing duties against Canadian products, particularly products enjoying government grants under Canadian regional development programs that were deemed "subsidized" under U.S. law.<sup>5</sup> Regional development programs are programs initiated by a government to assist a particular economically depressed geographic region.<sup>6</sup> Countervailing duties are special fees imposed on importers of a product; the amount of the duty, in theory, exactly matches some unfair advantage that the product enjoys in the U.S. market.

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<sup>1</sup> *Mulroney Pledges in Debate to Cancel FTA if it Harms Development Effort*, Daily Rep. for Executives (BNA) (Oct. 26, 1988) [hereinafter *Mulroney Pledges*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Christian Sci. Monitor, Nov. 14, 1988, at 22.

<sup>5</sup> *Canadian Trade Policy: The Anatomy of a Trade Deal*, THE ECONOMIST, Oct. 22, 1988, at 77.

<sup>6</sup> See *infra* text accompanying notes 76-81.

Canada's regional development programs were designed to help specific areas of Canada. The programs included tax incentives, low-interest loans, and development grants. Unfortunately for the recipients, current customs duty rules (discussed in detail below) allow the U.S. Department of Commerce to levy a countervailing duty whenever an import seems to have received assistance in production. The amount of the subsidy correspondingly reduces the price at which the product is offered, and a duty equal in price to the subsidy "levels the playing field"—as trade officials are often quoted.<sup>7</sup>

The FTA did not address countervailing duties levied on products subsidized under a regional development program. This was precisely the problem. Many Canadians could not conceive of an agreement that would be good for Canada unless the agreement specifically eliminated the U.S. practice.<sup>8</sup>

Lately, the U.S. has found more and more Canadian regional development programs to be subsidies. However, these programs had not been put in place to give a competitive advantage to exports. Although Prime Minister Mulroney was emphatic that "under no condition would we agree to limit our ability to subsidize regional development,"<sup>9</sup> some worried about future U.S. targets. Would universal health care and other insurance programs be seen as countervailable subsidies on Canadian products? Moaned

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<sup>7</sup> *The Ups, Downs and Ups Again of Brian Mulroney*, 6 Int'l Trade Rep. (BNA) No. 27, at 863 (July 5, 1989).

<sup>8</sup> For those of you in suspense about the outcome of the Canadian elections,

Mr. Mulroney's Progressive Conservatives won the election on November 21st with 170 seats, against 82 for the Liberals and 43 for the New Democrats. . . . [T]he Tories' contingent is smaller than the 211 members they had in the last House of Commons, and the party won only 43% of the popular vote. But everybody agrees that the prime minister can now legitimately push enabling legislation for the free-trade deal through parliament by the agreed deadline on January 1st.

THE ECONOMIST, Nov. 26, 1988, at 43.

Further, the United States and Canada hammered out agreements to govern trade disputes. The agreement now allows parties to dismiss their court cases and have their disputes settled by a panel of lawyers, whose decision would be final. The panel applies the same rules as would a court, although it is quicker, less expensive, and politically more discreet. The panels appear to give less deference to the U.S. International Trade Commission than the courts. *Fin. Times*, Oct. 10, 1990, § 1 at 4.

Still, since use of the panel is only available in cases involving Canada—and even then is not required—a discussion of judicial application of U.S. law to regional development programs is still appropriate.

<sup>9</sup> *Mulroney Pledges*, *supra* note 1.

Tony Halliday, Director General of Canada's Free Trade Management Office: "There is a perception Americans have that they [Americans] operate purely according to market principles and that in Canada everything that moves is subsidized."<sup>10</sup>

The issue of countervailing regional development programs brings together two opposing ideals.

On one hand is the desire to redistribute income toward socially deserving groups. On the other hand, the growing degree of openness and interdependence among trading nations requires trade to be as fair and free as possible. When governments try to help their poorer regions, they collide with principles of laissez-faire economic policies.<sup>11</sup>

This paper explores the extent to which U.S. law affects regional development programs in other countries. First, it introduces the concept of countervailing duties and the procedures for implementing them. Next, it looks substantively at the law of countervailing duties. The paper traces the legal development over the last eighty years to determine how the law has been applied, the types of subsidies that have been successfully countervailed, and the limitations of the law. Then, the paper looks specifically at regional development programs: what are they; why they are in place; and what aspects match the criteria for countervailability. Finally, the paper looks at public policy aspects and questions the appropriateness of applying countervailing duty laws to regional development programs.

## II. U.S. LAW OF COUNTERVAILING DUTIES

### A. *Procedure and Standard of Review*

Because administrative procedures for implementing countervailing duties are always the same, even for those cases having nothing to do with regional development programs, I discuss them first. The actual laws that allow the imposition of countervailing duties are discussed second.

The imposition of a countervailing duty begins when a manufacturer, producer, or wholesaler files a petition to the U.S. Department of

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<sup>10</sup> *Countervailing Duties: Too Early in FTA Subsidy Talks for Canada to Take Position*, 6 Int'l Trade Rep. (BNA) No. 45, at 1471 (Nov. 15, 1989).

<sup>11</sup> R. BALDWIN, *THE MULTILATERAL TRADE NEGOTIATIONS: TOWARD GREATER LIBERALIZATION* (1979), reprinted in R. BALDWIN, *The Tokyo Round of Multilateral Trade Negotiations*, INTERNATIONAL TRADE AND FINANCE 231 (1981).

Commerce, the administering authority for U.S. trade laws.<sup>12</sup> A petition also may be filed with the U.S. International Trade Commission (ITC) for cases involving countries that have signed the General Agreement on Tariffs and Trade (GATT) Subsidies Code<sup>13</sup> or have a similar understanding with the United States. Labor unions and trade or business associations also can file a petition if they represent manufacturers, producers, or wholesalers.<sup>14</sup> The Department of Commerce itself may initiate actions without a petition.<sup>15</sup>

If the Department of Commerce or the ITC deem the petition to have merit, the process continues. The International Trade Administration (ITA), a division of the Department of Commerce, investigates the existence of a countervailable subsidy and, if found, its amount. The ITA investigates petitions through hearings and, when possible, on-site verifications. Always, the ITA sends direct questionnaires to the foreign governments and industries named in the petition, asking them to provide information about the subsidy.<sup>16</sup> Information returned on the questionnaire can demonstrate that no financial or other subsidy exists. Alternatively, the information could explain away the subsidy by showing it to be fair or to fall within some exception, or it could provide more concrete evidence of the subsidy amount. Failure to supply economic and other data to ITA investigators is usually, as a practical matter, detrimental to the foreign exporter. The Department of

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<sup>12</sup> In 19 U.S.C. § 1303, an important law relating to countervailing duties (discussed in greater detail below), the administering authority was the Secretary of the Treasury. 19 U.S.C. § 1303(b) (1988); 19 U.S.C. § 1677(1) (1988). Subsequently, all functions of the Secretary of the Treasury, the General Counsel of the Treasury, or the Department of the Treasury were transferred to the Secretary of Commerce. Reorganization Plan No. 3 of 1979, § 5 *reprinted in* 19 U.S.C. § 2171 app. at 147-54. The Treasury Department still assesses and collects duties as directed by the Secretary of Commerce. *See also* Hercules, Inc. v. United States, 673 F. Supp. 454, 463 (Ct. Int'l Trade 1987) ("The Secretary of Commerce has been entrusted with the authority and responsibility for administering the countervailing duty law.").

<sup>13</sup> The General Agreement on Tariffs and Trade (GATT) is a multilateral treaty accepted by 23 countries in 1947. It addresses customs and commercial policy, focusing primarily on tariffs and other trade barriers. In addition to those parties who have both signed and ratified the treaty, 85 countries have signed the treaty. 5 THE NEW ENCYCLOPEDIA BRITANNICA 174 (15th ed. 1986).

<sup>14</sup> Otterness, McFaul & Cutshaw, *The ABCs of American Trade Laws on Foreign Dumping and Subsidies; U.S. Trade Laws*, 9 BUS. AM. 4 (Dec. 8, 1986); *Id. See, e.g.,* Roses, Inc. v. United States, 743 F. Supp. 870 (Ct. Int'l Trade 1990) (petition was filed by the California Floral Trade Council).

<sup>15</sup> Otterness, McFaul & Cutshaw, *supra* note 14.

<sup>16</sup> *Id.*

Commerce is authorized to use "the best information otherwise available" and will also use other, less accurate and less complete sources.<sup>17</sup> The Department, however, remains compelled to "verify all information relied upon in making a final determination in an investigation."<sup>18</sup> Furthermore, the Department must report "the methods and procedures used to verify such information."<sup>19</sup>

The Court of International Trade (CIT), a federal district court sitting in Washington, D.C., hears appeals from Department of Commerce decisions to impose (or to decline to impose) a countervailing duty. Within thirty days after notice of the Department's decision, an interested party may challenge an action by filing suit.<sup>20</sup> The CIT must uphold the Department's findings unless it determines that the ruling is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."<sup>21</sup>

The court gives much deference to Department of Commerce findings.<sup>22</sup> "Substantial" evidence, here, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>23</sup> "In enacting the 1979 Trade Agreements Act," stated CIT Judge Musgrave, "Congress evidenced an intent to grant greater flexibility to the administering agencies so as to make less difficult and less lengthy the application and enforcement of the laws in these areas."<sup>24</sup>

### B. *The Substantive Law*

Two sections of the United States Code, sections 1303 and 1671, allow the "administering authority"<sup>25</sup> to impose countervailing duties. Both sections fall under Title 19, Customs Duties. One section was part of the Trade Act of 1930 and now appears as section 1303. It states that whenever any country pays directly or indirectly, "bounty or grant" upon the

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<sup>17</sup> 19 U.S.C. § 1677e (1988).

<sup>18</sup> 19 U.S.C. § 1677e(b)(1) (1988).

<sup>19</sup> 19 U.S.C. § 1677e(b) (1988).

<sup>20</sup> 19 U.S.C. § 1516a(a)(1)-(2) (1988).

<sup>21</sup> 19 U.S.C. § 1516a(b)(1)(B) (1988).

<sup>22</sup> *Armco Inc. v. United States*, 733 F. Supp. 1514, 1518 (Ct. Int'l Trade 1990); *Hercules, Inc. v. United States*, 673 F. Supp. 454, 463 (Ct. Int'l Trade 1987).

<sup>23</sup> *Hercules*, 673 F. Supp. at 463 (citing *Matsuhita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

<sup>24</sup> *Armco*, 733 F. Supp. at 1518.

<sup>25</sup> That is, the Department of Commerce. See *supra* note 12.

manufacture, production, or export of any merchandise, upon the article's importation into the United States, "there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, *a duty equal to the net amount* of such bounty or grant, however the same be paid or bestowed."<sup>26</sup>

Section 1303 excepts "any article or merchandise which is the product of a country under the Agreement." A country "under the Agreement" is a country that, with the United States, is a party to the Agreement on Subsidies and Countervailing Measures, as determined under section 2(b) of the Trade Agreements Act of 1979.<sup>27</sup>

Countries "under the Agreement" fall within the other applicable statute, section 1671. It contains provisions very similar to section 1303. Section 1671 states that if the administering authority determines that a country or private person is providing, directly or indirectly, a "subsidy" with respect to the manufacture of any article that is imported into the United States, then "there shall be imposed upon such merchandise *a countervailing duty*, in addition to any other duty imposed, *equal to the amount of the net subsidy*."<sup>28</sup>

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<sup>26</sup> 19 U.S.C. § 1303(a)(1) (1988) (emphasis added). In full, the section reads:

(a) Levy of countervailing duties. (1) Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671 of this title) whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

<sup>27</sup> As determined under § (b)(2)(B)(c)(5) of 19 U.S.C. § 2503 (1988). In summary, this means that the President has determined that the country has met certain criteria in representing its intentions in trade matters.

<sup>28</sup> 19 U.S.C. § 1671 (1988) (emphasis added). The entire code section reads as follows:

(a) General Rule. If—

There are two differences between sections 1671 and 1303. First, section 1671 refers to “subsidies” while section 1303 refers to “bounties or grants.” This distinction is not important for our purposes because the term “subsidy” in section 1671 has the same meaning as “bounty or grant” in section 1303.<sup>29</sup> Likewise, “bounty or grant” means the same as “subsidy,” and any statutory clarification of the term (for purposes of countervailing duties) is also meant to apply to section 1303.<sup>30</sup> Courts use the terms interchangeably. The second difference is that section 1671 requires a “material injury” or a threat of one. Although section 1303 does not require such a showing, it follows that without any injury, the Department of Commerce would not find sufficient grounds for continuing the investigation.

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- (1) the administering authority determines that—
    - (A) a country under the Agreement, or
    - (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and
  - (2) the Commission determines that—
    - (A) an industry in the United States—
      - (i) is materially injured, or
      - (ii) is threatened with material injury, or
    - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy. For purposes of this subsection and section 1671d(b)(1) of this title, a reference to the sale of merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

<sup>29</sup> 19 U.S.C. § 1677(5)(A) (1988).

<sup>30</sup> *Roses, Inc. v. United States*, 743 F. Supp. 870 (Ct. Int’l Trade 1990).

### C. The Law as Applied

#### 1. Early Cases

The usual problem with interpreting the laws of countervailing duties stems from the issue of what exactly qualifies as a “bounty or grant” or a “subsidy.”<sup>31</sup> The Supreme Court had the opportunity to rule on this question in 1903, just six years after the first version of section 1303 was passed.<sup>32</sup> In *Downs v. United States*,<sup>33</sup> the Department of the Treasury levied a countervailing duty on an importer of Russian sugar. The Russian government had levied taxes on sugar producers, but remitted those for sugar that was exported. The Russians defended on the grounds that they were not encouraging exports. They maintained that “the chief object of the government is to prevent, or at least to discourage, over-production with its attendant evils, and, to accomplish this, the law penalizes overproduction by imposing thereon double the regular excise tax.”<sup>34</sup> Thus, the remission was not a bounty or grant; rather it was the failure to impose a penalty. Writing for the majority, Justice Brown sought guidance from a higher authority than himself: *Webster’s Dictionary*. “A bounty,” he wrote, “is defined by Webster as ‘a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufactures.’”<sup>35</sup> Perhaps more to the point, he also considered a report issued from the Brussels Conference in 1898 convened for the purpose of considering the question of sugar bounties. The report considered bounties to be

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<sup>31</sup> Often, a defendant will also dispute the method used by the Department of Commerce or the amount of the duty the Department imposed. Technicalities are not within the scope of this paper, although they are touched upon from time to time.

<sup>32</sup> This was § 5 of the Tariff Act of 1897. The two provisions are practically identical, § 5 reading as follows:

[w]henever any country, dependency, or colony shall pay or bestow . . .  
any bounty or grant upon the exportation of any article or merchandise . .  
. there shall be levied and paid, in all such cases, in addition to the duties  
otherwise imposed by this act, an additional duty equal to the net amount  
of such bounty or grant.

*Downs v. United States*, 187 U.S. 496, 501 (1903).

<sup>33</sup> 187 U.S. 496 (1903).

<sup>34</sup> *Id.* at 503.

<sup>35</sup> *Id.* at 501.



[t]he direct advantages granted in case of exportation; the direct advantages granted to production; the total or partial exemptions from taxation granted to a portion of the manufactured products; the indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates; and the profit that may be derived from an excessive drawback.<sup>36</sup>

A bounty, therefore, is something that would, even if not directly intended to promote exports, encourage others to enter the export market. The Court held that a bounty existed because, under the Russian law, a limited amount of sugar (called “free sugar”) could be produced tax-free for sale domestically.<sup>37</sup> The tax for overproduction was sufficiently great that “if [a producer] be near a seaport town, he will probably prefer to export his surplus, even at the lower prices obtainable abroad.”<sup>38</sup> Thus, despite the law’s intention to stabilize the domestic sugar market, an export incentive existed that was sufficiently “bountiful” to justify countervailing duties to be imposed.

*Nicholas & Co. v. United States*<sup>39</sup> is another Supreme Court case addressing the definition of “bounty or grant.” This time, the Court was interpreting paragraph E of section 4 of the Tariff Act of 1913, the successor to the original countervailing duty law and one identical to current law.<sup>40</sup> At issue was the “allowance of three pence and five pence per gallon made . . . on exportation of certain British spirits.”<sup>41</sup> Again, the foreign exporters argued that the purpose of the British act was not to encourage exports. The allowances were “intended merely as compensation to distillers and rectifiers for costs due to British excise regulations and are not confined to cases of exportation.”<sup>42</sup> But the Court did not find it “necessary to go into such confusing considerations.”<sup>43</sup>

The question in the case is more direct, and is whether the three pence and five pence paid on account of export from the United Kingdom is the bestowal, “directly or indirectly” of a “bounty or grant upon the exportation of any article or merchandise from such

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<sup>36</sup> *Id.* at 501–02.

<sup>37</sup> *Id.* at 515.

<sup>38</sup> *Id.* at 508.

<sup>39</sup> 249 U.S. 34 (1919).

<sup>40</sup> This paper reflects case and statutory law through January 1, 1991.

<sup>41</sup> *Nicholas*, 249 U.S. at 34.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 37.

country," to use the words of [the statute]. Looking only at the paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a gallon, as the case may be, and the instant conclusion is that the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market.<sup>44</sup>

The British further defended on the grounds that the term "bounty" required some sort of accession to wealth, rather than the foregoing of some detrimental tax. But the Court declined to consider the word *bounty* separately from the word *grant*: "If the word 'bounty' has a limited sense the word 'grant' has not. A word of broader significance than 'grant' could not have been used."<sup>45</sup>

One general principle is derived from these two cases. It is the effect of the bounty or grant on the product, rather than the intention of its proponents, that controls. In both cases, the measure was to stabilize prices or to otherwise manage some domestic issue. The result of the policies, however, was seen in both decisions as an incentive to increase exports.

## 2. Statutory Changes in the Law

Both *Downs* and *Nicholas* involved subsidies that foreign governments applied directly to a specific industry. The issue of what constituted a "bounty or grant" became more complicated when two changes in the countervailing duty law were enacted. First, section 1303 was enacted with the words "upon the manufacture or production or export of any article."<sup>46</sup> Section five of the Tariff Act of 1897, the act at issue in the *Downs* case, was limited in application to subsidies granted "upon the exportation of" an article of merchandise.<sup>47</sup> Second, it was amended to add a definition of the word *subsidy*.<sup>48</sup>

The first change broadened the scope of the rule by allowing imposition of countervailing duties upon products whose "bounty" was

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 39.

<sup>46</sup> Pub. L. 93-618, 88 Stat. 1978 (1974) (codified at 3 U.S.C. § 303 (1930); now appearing as 19 U.S.C. § 1303 (1988)).

<sup>47</sup> *Downs v. United States*, 187 U.S. 496, 501 (1903).

<sup>48</sup> 19 U.S.C. § 1677(5)(B) (1988).

awarded any time prior to exportation, rather than limiting imposition to products subsidized upon departing the country of origin. Eliminating "upon exportation" allowed the U.S. to impose countervailing duties against bounties whose application did not distinguish exported merchandise from that sold domestically. Recall that the bounties in the *Downs* and *Nicholas* cases involved government action that arose only when the products were exported. Now, a grant or subsidy on any product that reached or could reach U.S. shores could be countervailed, whether or not the grant was specifically linked to exports.

The second change seemingly widened the coverage of the laws to groups of industries, but actually became a limitation. Section 1677(5)(B) of Title 19 attempted to clarify the law by listing some policies that would be deemed subsidies "if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned."<sup>49</sup> Because duties could be imposed for policies that did not distinguish exports, many programs seemed to be subsidies. A foreign manufacturer's first line of defense, then, was to claim that they did not fall within a definable industry or group.

### 3. Judicial Tests

Both *Downs* and *Nicholas* involved subsidies to a specific, identifiable manufacturer or group of manufacturers. There remained the question of the applicability of sections 1303 and 1671 to governmental benefits that all manufacturers seemed to enjoy.

As indicated above, the ITA is charged with investigating allegations of subsidization. The CIT will review the findings of the ITA and reverse when the decision is unsubstantiated on the merits.<sup>50</sup> Whether a subsidy available to everyone is countervailable is first a decision of the ITA. The decision then remains to be litigated to determine its legality.

In the beginning, the ITA used the "general availability" test. The test was explained and upheld in *Carlisle Tire and Rubber Co. v. United States*,<sup>51</sup> a case involving an accelerated tax depreciation allowance for machinery or equipment used directly for manufacturing. The allowance was available to all taxpayers. The ITA's policy was that grants or subsidies "available to all manufacturers [are] not preferential and are not bounties or

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<sup>49</sup> *Id.*

<sup>50</sup> See *supra* text accompanying notes 15-24.

<sup>51</sup> 564 F. Supp. 834 (Ct. Int'l Trade 1983).

grants.”<sup>52</sup> The Carlisle Tire and Rubber Company disagreed. They sought imposition of countervailing duties on bicycle tires and tubes from the Republic of Korea based on the benefits of the tax scheme mentioned above. The ITA declined to impose countervailing duties because the subsidy did not discriminate among producers.<sup>53</sup>

The CIT agreed with the ITA for three reasons. First, since the ITA was charged with administering the countervailing duty statute, the court was willing to accord it “great deference.”<sup>54</sup> Second, “absurd consequences would flow” from the position that generally available benefits would be countervailable. “Thus, included in . . . the category of countervailable benefits would be such things as public highways and bridges, as well as a tax credit for expenditures on capital investment even if available to all industries and sectors.”<sup>55</sup> Finally, these types of benefits simply did not fall within “the proviso of section 1677(5)(B) that they be furnished ‘to a specific enterprise or industry, or group of enterprises or industries.’”<sup>56</sup>

The court in *Carlisle Tire* declined to countervail non-specific governmental “bounties” mostly because they did not “seem” countervailable. Common sense and logic dictated that “general” benefits which everyone could enjoy were not the same export-assisting subsidies contemplated by the countervailing duty statutes. Otherwise, virtually any government policy benefitting a foreign manufacturer would fall within the statute as long as U.S. manufacturers did not enjoy a corresponding benefit of at least equal magnitude from their own government. Thus, an administrative limitation on the law of countervailing duties became officially sanctioned. *Carlisle Tire* lent to the law a judicial finding that, with respect to subsidies having a “general availability,” the imposition of a countervailing duty would be plainly absurd.

There remained one development, however, that was to combine a principle of the *Downs* and *Nicholas* cases with *Carlisle Tire*. *Downs* and *Nicholas* stood for the idea that it is the effect, above all, that controls the imposition of duties. *Carlisle Tire* held that generally available duties were not countervailable. Could policies that were facially “generally available” be, in reality, specific when applied, and if so, were these policies a counterexception to the “general availability” rule?

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<sup>52</sup> *Id.* at 837.

<sup>53</sup> *Id.* at 835–36.

<sup>54</sup> *Id.* at 837.

<sup>55</sup> *Id.* at 838–39.

<sup>56</sup> *Id.* at 839 (emphasis by the court).

*Cabot Corp. v. United States*<sup>57</sup> severely limited the general availability test by holding that subsidies that are generally available on their face but which, in practice, are conferred on a select group are subject to countervailing duties. In *Cabot* the plaintiff, a U.S. producer of carbon black, sought review of an ITA determination that a Mexican program was not a countervailable subsidy. Mexico provided government-set rates for carbon black feedstock which, along with natural gas and water, is essential for the production of carbon black.<sup>58</sup> The policy was part of a comprehensive development plan, available to everyone. Nonetheless, ordinary folks were not lining up in Mexico to take advantage of “bargain basement deals” on government-subsidized carbon black feedstock. There were only two producers of carbon black, Hules Mexicanos and Negromex. And because factories required specific tooling to make use of the type of carbon black available, “no enterprises or industries in Mexico other than the carbon black producers have the technology and ability to make commercial use of the product.”<sup>59</sup> The court overruled the ITA determination that government-set prices for carbon black feedstock were not countervailable because they were available to any purchaser:

The distinction that has evaded the ITA is that not all so-called generally available benefits are alike—some are benefits accruing generally to all citizens, while others are benefits that when actually conferred accrue to specific individuals or classes. Thus, while it is true that a generalized benefit provided by government, such as national defense, education or infrastructure, is not a countervailable bounty or grant, *a generally available benefit—one that may be obtained by any and all enterprises or industries may nevertheless accrue to specific recipients*. General benefits are not conferred upon any specific individuals or classes, while generally available benefits, when actually bestowed, may constitute specific grants conferred upon specific identifiable entities, which would be subject to countervailing duties.<sup>60</sup>

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<sup>57</sup> 620 F. Supp. 722 (Ct. Int’l Trade 1985).

<sup>58</sup> To help us better visualize the product in question, the court was kind enough to provide the following: “Carbon black is elemental carbon with incidental or planned surface oxidation that is formed under the controlled cracking, heating and quenching of a petroleum derivative feedstock, commonly referred to as carbon black feedstock.” *Id.* at 727.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 731 (emphasis added).

"The appropriate standard," continued the court, "focuses on the de facto case by case *effect of benefits* provided to recipients rather than on the nominal availability of benefits."<sup>61</sup>

*Bethlehem Steel Corp. v. United States*<sup>62</sup> is an odd case that completely rejected the general availability rule. This case found a generally available benefit to be countervailable despite a finding of specifically-accruing effects. Because it sits at odds with the other case law, it deserves some mention here. *Bethlehem Steel* involved a South African tax law that allowed 200 percent of training costs to be deductible as business expenses. The court overruled an ITA determination that no bounty or grant existed. Completely rejecting the notion that generally available benefits are exempt from countervailing duties, the court asserted that "the entire productive sector of a nation's economy is nothing more than a group of enterprises or industries."<sup>63</sup> The court found the idea that a country could shield an obvious subsidy merely by extending it to the entire economy to be an "insurmountable absurdit[y]."<sup>64</sup>

Subsequent cases have not gone so far as to reject outright the notion that a generally available benefit, enjoyed by all industries, is countervailable under section 1303 or 1671. Courts relying on *Bethlehem Steel* cite it mainly for its discussion of the interplay between the two code sections.<sup>65</sup> Other courts cite it as an example of types of subsidies that are countervailable in the first place.<sup>66</sup> Even courts that cite *Bethlehem Steel* to support some other proposition implicitly reject its holding—not by criticizing the case, but by merely ignoring it. In *Al Tech Specialty Steel Corp. v. United States*,<sup>67</sup> the court cites *Bethlehem Steel*'s language about the countervailability of tax laws but adds at the same time that the laws "do not confer countervailable benefits so long as, in their actual operation, they do not "result in special bestowals upon specific enterprises."<sup>68</sup> This language is more closely

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<sup>61</sup> *Id.* at 732 (emphasis added).

<sup>62</sup> 590 F. Supp. 1237 (Ct. Int'l Trade 1984).

<sup>63</sup> *Id.* at 1242.

<sup>64</sup> *Id.*

<sup>65</sup> See *PPG Indus. v. United States*, 662 F. Supp. 258, 264 (Ct. Int'l Trade 1987); *Cabot Corp. v. United States*, 620 F. Supp. 722, 730, 732 (Ct. Int'l Trade 1985).

<sup>66</sup> See *Al Tech Specialty Steel Corp. v. United States*, 661 F. Supp. 1206, 1212 (Ct. Int'l Trade 1987) (noting that tax laws are countervailable according to *Bethlehem Steel*).

<sup>67</sup> 661 F. Supp. 1206 (Ct. Int'l Trade 1987).

<sup>68</sup> *Id.* at 1212.

aligned with the thinking in *Cabot*: generally available benefits are not countervailable if they do not have specific effects.

It is unclear how much weight courts will give to the "general availability" factor. But general availability, even if no longer a bright line test, is not dead. Indeed, consider the following from *PPG Industries v. United States*.<sup>69</sup> This case revives the test altogether:

We do not consider a domestic program that does not restrict participation to specific industries or locations and that in fact is used by a wide variety of industries in various locations to be specifically provided. Therefore, we continue to uphold our determination that the [program under contention] is not provided to a specific enterprise or industry, or group of enterprises or industries, and that the program is not countervailable.<sup>70</sup>

#### 4. Subsidies Generally Considered Countervailable

Given general principles laid down by the Supreme Court, a statutory scheme, and the scheme's judicial construction, rough categories of subsidies have been identified as generally countervailable.<sup>71</sup> In one category are found *direct subsidy payments* like those from *Nicholas*. Despite attempts to characterize the allowance as compensation for additional costs, the Supreme Court held them to be subsidies.<sup>72</sup> *Downs* illustrates another category: *tax schemes*.<sup>73</sup> These include tax rebates, preferential tax treatments, including accelerated depreciation allowances, and unjustified tax remissions, especially those linked to export sales. *Government price support* programs are a third category; another is *loss indemnification* for exports with associated credit-risk guarantees. *Currency manipulation* schemes can provide favorable exchange rates to certain producers and exporters.<sup>74</sup> *Transport subsidies* or *preferential supplies* of goods and services are more means to subsidize production.<sup>75</sup>

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<sup>69</sup> 712 F. Supp. 195 (Ct. Int'l Trade 1989).

<sup>70</sup> *Id.* at 200.

<sup>71</sup> J. BESELER & A. WILLIAMS, ANTI-DUMPING AND ANTI-SUBSIDY LAW, THE EUROPEAN COMMUNITIES 127-36 (1986); Fuller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL'Y IN INT'L BUS. 17 (1969).

<sup>72</sup> J. BESELER & A. WILLIAMS, *supra* note 71, at 129.

<sup>73</sup> *Id.* at 132-35.

<sup>74</sup> *Id.* at 130.

<sup>75</sup> *Id.* at 130-32.

### D. Summary

The law applying to countervailing duties can be summarized as follows: Two sections of the United States Code provide the substantive law; they apply to different countries (one section is for signatories of the GATT Subsidies Code) but are interpreted the same way. These statutes provide that bounties, grants, or subsidies that are generally available to all manufacturers are not subject to countervailing duties, but those subsidies accruing to specific industries or groups of industries are subject to them. The purpose of the bounty or grant counts for nothing. Although the fact that it is (facially) available to everyone in the exporting country could give rise to a presumption of general availability, a benefit that is generally available could in fact accrue primarily to specific industries.

## III. REGIONAL DEVELOPMENT PROGRAMS

This section discusses the specific application of countervailing duty law to regional development programs. It further explores regional development programs, reviews case law applying countervailing duty laws to subsidies arising under a regional development program, and offers an evaluation of these cases.

### A. Regional Development Programs: Nature and Purpose

Economies develop naturally by regions. One author explained that industries first located either in areas where production was largely "artisanal" (such as textiles), and then mechanized using new forms of energy, or in areas which possessed natural resources (particularly iron and coal), which corresponded to new activities in steel-producing technology and metallurgy.<sup>76</sup> The rise in technology, the geographic location of natural resources used in producing primary products, and competition limited

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<sup>76</sup> J. PERRIN, *LE DÉVELOPPEMENT RÉGIONAL* 42 (1974). I regret that this book is not published in English, and I will reproduce paraphrased material in the original, here:

Les premières industries se localisent soit dans des zones où existaient déjà des activités de production (par exemple textile) jusque-là artisanales et qui se mécanisent en utilisant des formes nouvelles d'énergie, soit dans des zones qui possèdent les ressources naturelles, spécialement le fer et le charbon, correspondant aux activités nouvelles de la sidérurgie et de la métallurgie.



largely to the area all favored the creation of regional economies. New technology gives rise to second-generation products that use additional raw materials. Thus progresses development in these areas. The United States is informally divided into industrial regions, many agricultural, through terms such as "Iron Belt," "Corn Belt," and "Sun Belt."

Economic development is not, however, guaranteed—or guaranteed to last forever. Some geographic areas either never develop or never sustain a high level of economic activity. Regions also decline. Their resources are depleted, their equipment becomes obsolete, and interregional competition develops, brought on by better technology, better transportation, and better communication.<sup>77</sup> Regions in decline become depressed, both economically and psychologically, through unemployment and crumbling infrastructures. Those areas that have managed to sustain their growth often do so through policies which keep them competitive and forestall decline.

Countries, therefore, undertake to develop specific geographic regions. In the summer of 1990, China announced a regional development program in light technology. The British Broadcasting Company reported that "[t]he more developed coastal area in east China will concentrate on technology-intensive sectors. The area will, on the one hand, continue to improve its investment climate and expand market abroad for its products, and on the other help the middle and western areas develop their pillar industries."<sup>78</sup> In Brazil, President Fernando Collor de Mello has used regional development programs to redistribute wealth geographically in light of monumental poverty in the northeast.<sup>79</sup> The Philippines, Thailand, Malaysia, Nepal, and many other Asian countries have turned to regional development schemes as a way to benefit the country as a whole.<sup>80</sup> The United States' experience is limited largely to mostly federal "urban

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Désormais, les régions qui ont décollé et qui veulent continuer à progresser doivent s'affronter des aléas liés à la possession de ressources naturelles. . . . [L]a concurrence interrégionale est rendue de plus en plus aiguë par les progrès des transports à grande distance. On notera aussi que les régions les plus anciennement développées doivent faire face au vieillissement relatif et à l'obsolescence de leurs équipements.

PERRIN, *supra* note 76, at 56–57.

<sup>78</sup> *Industrial Production; Light Industry to Undergo Adjustments*, BBC, Summary of World Broadcasts, August 29, 1990 at FE/W0143/A/1.

<sup>79</sup> A "Have" Country Full of Have-Nots, L.A. Times, August 23, 1990, at B7, col. 2.

<sup>80</sup> See UNCRO (UNITED NATIONS CENTRE FOR REGIONAL DEVELOPMENT), GROWTH POLE STRATEGY AND REGIONAL DEVELOPMENT PLANNING IN ASIA (1975).

renewal" programs. The limitation stems partly from the fact that power is shared at so many levels (city, county, state, federal) that a coherent policy to reduce "pockets of poverty," such as Appalachia, is difficult to organize. Blame lies also in a "general anti-planning" mentality that one French writer deems to be present in the United States.<sup>81</sup>

### *B. Regional Development Policies in Countervailing Duty Cases*

It is well-settled that regional development programs are subject to scrutiny under U.S. law for purposes of imposing countervailing duties. The benefits of the programs can be reviewed to determine whether they constitute a bounty or grant. In almost all cases, regional assistance has satisfied the statutory criteria for imposition of a countervailing duty. Subsidies bestowed upon specific regions for purposes of helping manufacturers seemed so obviously "bounties" that they have been routinely countervailed.

Before *Carlisle Tire*'s rule that generally available subsidies were exempt, foreign governments tried to argue that a subsidy that merely offset the disadvantages of being in a depressed region was not really a subsidy. This argument has been successful. Although courts are quick to decide that a subsidy exists, they offer to calculate the "net" subsidy. In *ASG Industries v. United States*,<sup>82</sup> a regional program conferring a "net" subsidy was sufficient to require imposition of a countervailing duty.

*ASG Industries* involved domestic manufacturers and wholesalers of float glass. They alleged that benefits under various regional development programs that included low-interest loans and investment subsidies in the form of cash grants and tax credits were bounties or grants within the countervailing duty law. "Once it has been determined that a bounty or grant is being paid or bestowed," wrote the court,

19 U.S.C. § 1303(a)(1) provides that "there shall be levied . . . a duty equal to the net amount of such bounty or grant." Such language implies that certain deductions may be made from the actual payments to calculate the net bounty or grant and that all relevant circumstances are to be taken into account.<sup>83</sup>

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<sup>81</sup> PERRIN, *supra* note 76, at 172. "La situation actuelle aux Etats-Unis [est le produit d'] un vieux réflexe général antiplan ficateur."

<sup>82</sup> 610 F.2d 770 (C.C.P.A. 1979).

<sup>83</sup> *Id.* at 777.

In a corresponding footnote, the court noted that "Congress reiterated this 'net amount' concept in the legislative history of the extension of the waiver provision."<sup>84</sup> Further quoting Congress, the court observed: "The countervailing duty, which is imposed in addition to regular duties, is equal to the net amount of the bounty or grant and is intended to offset the advantage afforded by the foreign subsidy practice."<sup>85</sup> The court also found support in *Zenith Radio Corp. v. United States*,<sup>86</sup> in which the Supreme Court considered remission of an excise tax as an *offset* to the bounty received.<sup>87</sup> Finally, the court took language from the 1897 statute itself, which did provide for levying of duties equal to the "net amount" of any export bounty or grant.<sup>88</sup> Thus, the court concluded,

[o]nce it is established that a foreign manufacturer is receiving payments such as those here involved . . . from its government, a countervailing duty must, absent a waiver by the Secretary, be imposed *unless, in considering all circumstances surrounding the payment, certain deductions can be established resulting in no net benefit to that manufacturer*.<sup>89</sup>

*Michelin Tire Corp. v. United States*<sup>90</sup> extensively considered offsets in determining the amount of a subsidy. The court seemed to give the defendant every break. It "removed from the equation those benefits of the location [that] cannot be quantified,"<sup>91</sup> such as the absence of a separatist movement troubling neighboring Québec. Further, the court declined to limit the offsets to specific categories of grants or bounties:

Although these regional development programs may channel their aid into specific categories such as construction, it is abundantly clear that they are intended to compensate for a wide range of disadvantages of the region. A distinction must be recognized between the variety of problems which these programs are intended to alleviate over a prolonged period of time and the necessity of embodying the aid in a form which can be of practical use to a

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<sup>84</sup> *Id.* at n.14.

<sup>85</sup> *Id.* (citing S. REP. NO. 45, 96th Cong., 1st Sess. 2 (1979)).

<sup>86</sup> 437 U.S. 443 (1978).

<sup>87</sup> *ASG Indus. v. United States*, 610 F.2d 770, 778 (C.C.P.A. 1979).

<sup>88</sup> *Id.* at 777.

<sup>89</sup> *Id.* at 778 (emphasis added).

<sup>90</sup> 2 Ct. Int'l Trade 143 (1981).

<sup>91</sup> *Id.* at 160.

recipient. *If offsets are to be considered, a fair evaluation must take into account the full range of disadvantages of the region and not limit itself to the nominal category of the grant.*<sup>92</sup>

And so, over several pages, the court manipulated various mathematical formulae and considered both sides' arguments about what should be included and how to calculate the amounts. Ultimately, considering the weight of all the evidence, the court sustained the original determination of the net subsidy.

In *Carlisle Tire* the court noted in dictum that "although no decision of this court has directly passed on this specific question, several cases suggest that at a minimum either a regional or industry preference be present in order for a bounty or grant to exist."<sup>93</sup> The court was rather loose in its observation; the case did not involve a regional development program at all.

The observation became law: In *United States Steel Corp. v. United States*<sup>94</sup> (decided three weeks after *Carlisle Tire* by the same judge as in *Michelin Tire*) the court flatly states that "the countervailing duty law operates in cases where a special advantage or preferential treatment is given to a class of persons. Availability of special treatment to an entire industry or region is still the grant of an advantage or preference under the law."<sup>95</sup>

By 1985 it was taken for granted that, despite the noncountervailability of generally available subsidies, regional ones were countervailable. In *Hercules, Inc. v. United States*,<sup>96</sup> the court flatly stated: "It is clear from the case law, the term 'subsidy' has been interpreted to include regional preference programs as countervailable subsidies."<sup>97</sup> The court cited *United States Steel* and relied on the same line of cases.<sup>98</sup> The court also cited the observation by the *Carlisle Tire* court to support its assertion.<sup>99</sup>

It seems that the law has developed as follows: The early cases involving regional development programs were decided before *Carlisle Tire*. The *Carlisle Tire* case established the notion that programs available to an

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<sup>92</sup> *Id.* at 161 (emphasis added).

<sup>93</sup> *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983).

<sup>94</sup> 566 F. Supp. 1529 (Ct. Int'l Trade 1983).

<sup>95</sup> *Id.* at 1537.

<sup>96</sup> 673 F. Supp. 454 (Ct. Int'l Trade 1987).

<sup>97</sup> *Id.* at 476.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

entire country generally were not countervailable. No court addressed the possibility that regional development programs could be considered "generally available" to the region, rather than to the country as a whole. In considering the entire country, regional programs would, by definition, not fall into the category of "generally available" and could be presumed, at the outset, not to qualify for the exemption.

Following *Cabot Corp. v. United States*,<sup>100</sup> subsidies "generally available" were not automatically exempt; a case-by-case approach was required to determine whether any specific effects were accruing. *Comeau Seafoods Ltd. v. United States*,<sup>101</sup> decided in mid-1989, considered a Canadian program benefitting provinces differently depending on their economic disadvantage (per capita income, level of unemployment, and capacity to raise revenue). In fact, the program was available to industries all over Canada (in different amounts, of course, depending on region) and the criteria were neutrally applied. Because the regional programs did accrue to specific recipients (i.e., the poor ones), the program was countervailable.<sup>102</sup>

### C. Special Treatment for Regional Development Programs?

Whether countervailing duty rules apply to regional development programs depends on the tests and rules of construction that the courts apply to subsidy cases in general. Whether countervailing duty rules *should* apply to regional development programs requires a closer look at the programs themselves and at the spirit of U.S. law. If regional development programs number among the practices that U.S. customs laws were intended to address, the application of the law to these programs should not be challenged. The following section looks at both the programs and laws to evaluate the imposition of countervailing duties.

#### 1. The Spirit of the Law

Consider the following remarks: "The purpose of the [countervailing duty] law is to prevent unequal competition in our markets—to prevent foreign goods from competing with domestic goods at a lower price than they would be sold."<sup>103</sup> "This purpose is relatively clear from the face of the

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<sup>100</sup> 620 F. Supp. 722 (Ct. Int'l Trade 1985).

<sup>101</sup> 724 F. Supp. 1407 (Ct. Int'l Trade 1989).

<sup>102</sup> *Id.* at 1416.

<sup>103</sup> *ASG Indus. v. United States*, 467 F. Supp. 1200, 1230 (Ct. Int'l Trade 1979).

statute and is confirmed by the congressional debates: the countervailing duty was intended to offset the unfair competitive advantage that foreign producers would enjoy from export subsidies paid by their governments."<sup>104</sup> These writers suggest that receipt of assistance from a foreign government corrupts the free market system. Does all government aid so corrupt? If all benefits are bounties or grants, would not things such as highways and bridges, as well as tax credits for capital expenditure be countervailable?

The statutes that provide for countervailing duties are worded to apply to all bounties and grants and subsidies. Because this application is too broad, judges have devised tests to determine when the statute should apply. The current state of the law—that generally available benefits except those that, in effect, turn out not to accrue to specific industries—reflects an intelligent, workable policy. Under these rules, some governmental programs are countervailable; some are not. When rules and judicial tests weed out the government programs that the law was never intended to address, the law will work perfectly.

The law does not work well in the case of regional development programs. Under the rules, regional development programs are routinely countervailed, yet they do not seem to fall within the purpose of the statute. There is no indication, either in the legislative history or in the subsequent case law, that "group of industries" was ever intended to refer to industries grouped geographically, rather than by product. This determination seems to have come about in an attempt to find a justification for excluding regional development programs from the "general availability" exception without having to limit the inquiry to the region.

Furthermore, regional development programs would be exempt from countervailing duties if considered within the context of the region and not the entire country. Why, for example, should a program in Nova Scotia be considered special merely because it is not available in British Columbia, a continent away? These areas are not separate countries, and if they were, depressed Nova Scotia might find many of its regional policies sufficiently "generally available" to exempt them from U.S. customs law.

## *2. Traditional Government Benefits*

Some government activities cannot be efficiently managed by the private sector. Thus, no case has held that bridges, roads, and other similar

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<sup>104</sup> *British Steel Corp. v. United States*, 605 F. Supp. 286 (Ct. Int'l Trade 1985) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56).

benefits are countervailable subsidies. Perhaps it is because everyone knows that governments are supposed to provide these services to constituents.

Regional development is a process that free enterprise cannot be expected to undertake. It also is a process that requires government intervention.<sup>105</sup> As one writer pointed out,

[i]t is fitting . . . that interregional imbalances should be managed. Spatial inequalities cannot be corrected by market forces. On the contrary, the market, if left to its own devices, serves to amplify them. Here still, the threshold is quickly passed beyond which imbalances cease to have beneficial effects for becoming cumulative and become an impede any developing impetus for lagging regions. Kept dependent on growth regions, they have that much more difficulty in achieving autonomy in development.<sup>106</sup>

A rule exempting true regional development programs—those without industry preferences in their operation—from countervailing duties would be consistent with the GATT, of which the U.S. is a member. Article III explicitly permits “the payments of subsidies exclusively to domestic producers,” although direct subsidies for exports of non-primary products were to end after 1958.<sup>107</sup> Article XI of the Agreement attempts to clarify the GATT position on the definition of subsidy. It states that

[s]ignatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable. Signatories note that among such objectives are the elimination of

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<sup>105</sup> See PERRIN, *supra* note 76, at 71–110.

<sup>106</sup>

Il convient . . . de maîtriser les déséquilibres interrégionaux. Or les inégalités spatiales ne peuvent pas être corrigées par les mécanismes du marché. Au contraire, celui-ci contribue, si on le laisse jouer librement, à les amplifier. Ici encore le seuil est vite dépassé au-delà duquel les déséquilibres cessent d'avoir des effets bénéfiques pour devenir cumulatifs et constituer un obstacle à l'essor des régions en retard. Maintenus dans la dépendance des régions foyers, elles en d'autant plus de mal à conquérir leur autonomie de développement.

*Id.* at 109.

<sup>107</sup> BALDWIN, *supra* note 11, at 236.

industrial, economic, and social disadvantages of specific regions.<sup>108</sup>

The European Economic Community (EEC) takes a similar approach. In the EEC, "domestic subsidies, for example in the form of governmental aid to depressed areas, were a legitimate exercise of national power which ought not to be countervailed unless the subvention in question was a disguised form of export subsidy."<sup>109</sup>

### 3. *A Proposed Approach*

The abandonment of the "general availability" test was not a mistake—outside the context of regional development programs. It makes sense to go beyond a facial review of a foreign program; if the benefits of the program are truly accruing to one industry, then the program *does* fall within those contemplated by the countervailing duty rules. I do not suggest that regional development programs receive lesser scrutiny. If, under a regional development program, benefits accrue to a specific industry or group, then the program might also deserve countervailability. However, a better approach is a balancing test that considers more than just who benefits and by how much. Courts should consider a number of factors.

First, is the program one that a government, exclusively, has the power to implement? Markets are distorted when governments act inconsistently with standards of commercial reasonableness in areas usually left to businesses. In some projects, however, private enterprise is not the best vehicle. A regional development is one of those projects.

Second, it is important to consider the purpose of the government program. Many programs will involve loans, grants, and other incentives that fall outside traditional governmental benefits, yet regional development requires them in order to spur growth and development of industry. Our laws must distinguish between government programs designed to benefit a specific sector and programs designed to implement broader goals, such as a lower inflation rate or improved health care.<sup>110</sup>

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<sup>108</sup> Agreement on Interpretation and Application of Articles VI, XVI, and XXII of the General Agreement on Tariffs and Trade, April 12, 1979, Part II, art. 11, 31 U.S.T. 513, T.A.I.S. No. 9619.

<sup>109</sup> J. BESELER & A. WILLIAMS, *supra* note 71, at 15.

<sup>110</sup> This is precisely the language the Department of Commerce used to justify its refusal to countervail programs it considered "generally available." Panzerella, *Is the Specificity Test Generally Applicable?*, 18 LAW & POL'Y IN INT'L BUS. 147, 422 n.22.



Third, our laws should consider other indications of the good faith of the program. Some programs may look like bona fide governmental development when they are really underhanded attempts to manipulate their export position. Likewise, some programs may seem to accrue to a specific recipient, but perhaps this phenomena will disappear when other beneficiaries grow sufficiently to take advantage of the program.

Thus, courts should consider whether the program seems arbitrary or capricious. This standard of review, the same as applied to administrative agencies,<sup>111</sup> would test the good faith of the foreign government in providing the grant. The court should consider the actual benefits accrued, and the extent to which the program seems likely to produce the stated goals. Admittedly, this approach seems to meddle in the policy-making apparatus of foreign governments, but it is no more intrusive than the current system—where interrogatories and explanations are demanded of foreign governments. Perhaps other countries may even be more willing to cooperate if they see the United States as a reasonable actor, willing to allow governments to operate in spite of a justifiable concern over unfair trade.

A rule that takes into consideration the real intent of the policy and balances its reasonableness against its disruptive effect on international trade would prevent other, perhaps more bizarre, results under current law. For example, Senator Steve Symms (R-Idaho) is worried about “subsidies coming through environmental laws.”<sup>112</sup> According to him, a fertilizer plant in Saskatchewan threatens his “constituents in direct competition with the Canadian fertilizer interests”<sup>113</sup> because the environmental laws in that province are less restrictive than those in Idaho. Can failure to enact an environmental standard as exacting as that in the U.S. be considered a bounty or grant?

#### IV. CONCLUSION

This paper summarized the laws relating to countervailing duties. It looked in particular at the law as it affects regional development programs, and provided some comment about this area of the law. Countervailing duties are now enforced on a case-by-case basis; those having particular effects on a specific industry or group of industries are countervailable despite being generally available on their face.

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<sup>111</sup> 5 U.S.C. § 706(2)(A) (1988).

<sup>112</sup> Transcript of International Trade Subcommittee of the Senate Finance Committee, September 28, 1990, remarks of Senator Steve Symms.

<sup>113</sup> *Id.*

This law makes sense, generally, but an exception is warranted for regional development programs. Currently, regional development programs are countervailable because a region is a "group of industries" under the law. These industries receive a preference over those in the country as a whole. This makes it exceedingly difficult for countries, especially Canada, to develop regions and continue to maintain a civil trading relationship with the very important U.S. market. A better approach is a balancing test to consider the nature of the program, its purpose, and its good faith. Such an approach would not frustrate legitimate programs by governments. Additionally, such an approach would extend the rule of "general availability"—a rule which makes sense in cases of general development programs—to specific regions, and would consider the particular region as the economic unit to which subsidies are bestowed.

Under the basic economic theory of comparative advantage, market players who, under assumed ideal conditions, specialize their talents and trade with players who specialize in some other field, produce together a rational market in which everybody gains. Allocating resources to those industries in which a country does not have a comparative advantage is inefficient. Allocating resources to areas of a country that have comparatively less to offer than other areas is also inefficient. But governments sometimes have to make inefficient allocations. Welfare payments, for example, arguably are inefficient since they allocate resources from those who produce to those who, for whatever reason, find themselves producing less than they need to live. A blind notion that all government intervention is bad because it is inefficient is wrong.

On the whole, a true regional development keeps people alive. It encourages productivity and self-sufficiency. Regional development should not be discouraged. A clear, fair approach to countervailing duties in regional development cases would forestall foreign wrath as evidenced in Canada's elections, a wrath that undermines the very trading position that the countervailing duty law was implemented to protect.

*D. Ronald Surbey*